

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:

5 SECURITIES INVESTOR PROTECTION

6 COMPANY,

7 Plaintiff,

8 v. Case No. 08-01789(SMB)

9 BERNARD L. MADOFF INVESTMENT

10 SECURITIES, LLC, ET AL.,

11 Defendants.

12 - - - - - x

13 PICARD,

14 Plaintiff,

15 v. Adv. Case No. 09-01161(SMB)

16 KINGATE GLOBAL FUND, LTD.,

17 ET AL.,

18 Defendants.

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22 U.S. Bankruptcy Court

23 One Bowling Green

24 New York, New York

25

March 13, 2014

10:42 AM

B E F O R E :

HON STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

Hearing re: Motion to Amend/Notice of Motion for Entry of
Order Pursuant to Rule 15 of the Federal Rules of Civil
Procedure as Incorporated by Rule 7015 of the Federal Rules
of Bankruptcy Procedure, Granting Motion for Leave to File
Fourth Amended Complaint

Hearing re: (96) Motion for leave to file fourth amended
complaint

Transcribed by: Dawn South

1 A P P E A R A N C E S :

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7 BY: GERALDINE E. PONTO, ESQ.

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15 BY: ROBERT S. LOIGMAN, ESQ.

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1 P R O C E E D I N G S

2 THE COURT: Madoff. Now is Madoff.

3 (Pause)

4 THE COURT: Who represents the trustee?

5 MS. PONTO: Good morning, Your Honor, Geraldine
6 Ponto, Baker & Hostetler representing the SIPA Trustee.

7 THE COURT: Okay.

8 MR. LOIGMAN: Good morning, Your Honor, Robert
9 Loigman of Quinn Emanuel, we represent the joint liquidators
10 of the Kingate Global Fund and the Kingate Euro Fund.

11 THE COURT: Okay. Go ahead.

12 MS. PONTO: Good morning again, Your Honor.

13 This is the trustee's motion for leave to amend
14 the third amended complaint and to file a fourth amended
15 complaint.

16 The standard -- the authority for our motion is
17 Rule 7015(a)(2), leave to amend under the applicable
18 standard shall be freely given when justice so requires.
19 It's within this Court's discretion.

20 Your Honor, we -- in our motion -- it's
21 uncontested by the way -- so we certainly have argued that
22 with respect to the timing of the motion, the posture of the
23 procedural history in this case, the trustee's good faith,
24 the lack on prejudice to any of the multiple defendants, and
25 the fact that the claims that we've alleged are not futile

1 and are indeed valid --

2 THE COURT: Uh-huh.

3 MS. PONTO: -- all of those factors inure in favor
4 of granting us leave to file the fourth amended complaint.

5 THE COURT: Is there any objection to the motion?

6 MR. LOIGMAN: No, Your Honor, we came today just
7 to speak to one related issue.

8 THE COURT: All right. Well since there's no
9 objection and since leave to amend should be freely granted
10 and there does not appear to be any prejudice I'll grant the
11 motion.

12 When are you going to file and serve your amended
13 complaint?

14 MS. PONTO: Your Honor, we don't think we have to
15 serve it again. We're filing it today.

16 THE COURT: Is it attached to your motion?

17 MS. PONTO: Yes, it was.

18 THE COURT: Okay.

19 MS. PONTO: Your Honor, we're going to file though
20 separate docket entry today.

21 THE COURT: All right. Submit an order granting
22 the motion.

23 MS. PONTO: Will do.

24 THE COURT: What is the other matter?

25 MR. LOIGMAN: Good morning, Your Honor. As I

1 mentioned, Robert Loigman, we represent the court-appointed
2 joint liquidators of the Kingate Euro Fund and the Kingate
3 Global Fund. So like Ms. Ponto we represent court-appointed
4 officials that are overseas.

5 THE COURT: Where is that -- is that a main
6 proceeding pending somewhere else?

7 MR. LOIGMAN: It's a main proceeding pending in
8 BVI.

9 THE COURT: BVI, okay.

10 MR. LOIGMAN: Actually two proceedings, because
11 they're two separate legal entities. And the only reason --
12 we, as Ms. Ponto pointed out, did not object to the filing
13 of the complaint nor did any of the other defendants. There
14 are several other defendants in this case.

15 We really only came here today to raise one issue.
16 A number of issues in the -- in the complaint have been
17 withdrawn to the District Court and are now before Judge
18 Rakoff.

19 THE COURT: Which ones?

20 MR. LOIGMAN: Well two issues in particular. One
21 has to do with the extraterritorial application of certain
22 of the -- well the -- all that is at issue here under
23 Morrison versus --

24 THE COURT: Uh-huh.

25 MR. LOIGMAN: -- National Australia Bank, that's

1 not one that's of particular concern to my client but is to
2 other clients -- to other defendants in this case.

3 The issue that is of more direct concern to my
4 client is the withdrawal of the determination of the good
5 faith standard under Section 548(c), and that --

6 THE COURT: Is your -- are your -- underlying
7 debtors feeder funds?

8 MR. LOIGMAN: Yes.

9 THE COURT: And it's alleged that they had
10 knowledge of the Ponzi scheme?

11 MR. LOIGMAN: That's what the trustee is alleging.

12 THE COURT: Well, I understand that.

13 MR. LOIGMAN: Right. So -- and just to be clear
14 on the record.

15 THE COURT: So what's the issue before Judge
16 Rakoff? I thought he decided that. I know it's in the
17 Second Circuit now.

18 MR. LOIGMAN: No -- well there's different issues.
19 What's before the Second Circuit right now had to do with
20 the application of Section 546(e), and Judge Rakoff decided
21 -- there were two cases as to 546(e).

22 One case, the Grieve (ph) case, which was before
23 the Second Circuit, was the holding that 546(c) applies in
24 the context of this SIPA proceeding.

25 There was a separate essentially companion case,

1 because he split it into two parts, where if the trustee
2 alleged that the defendants had acted without good faith the
3 question was would 546(e) still apply in those cases? And
4 in that --

5 THE COURT: If the circuit reverses on the 546(e)
6 issue that second issue goes away though.

7 MR. LOIGMAN: Yes, but that second issue has been
8 decided. That's not what I'm raising. That second issue
9 Judge Rakoff has said, Section 546(e) will still apply
10 unless the trustee has alleged actual knowledge that Madoff
11 was not trading securities.

12 THE COURT: Right.

13 MR. LOIGMAN: Separately there are avoidance
14 claims, including, for example, the actual fraudulent
15 transfer claim, that would continue even if 546(e) applied.
16 And so then there's going to be an issue about the
17 defendants' good faith with respect to those transfers that
18 are being challenged.

19 A number of defendants -- probably hundreds of
20 defendants raised the issue about whether SIPA affects the
21 standard for determining a defendant's good faith.

22 THE COURT: Is that before Judge Rakoff?

23 MR. LOIGMAN: And that is before Judge Rakoff, and
24 that's what Judge Rakoff defined as the so-called, and this
25 is a defined term, good faith standard issues, and he issued

1 an order withdrawing those issues and saying, as he did with
2 respect to his other orders, that the procedures set forth
3 in his order is the sole and exclusive procedures for
4 determination of the good faith standard issues and that the
5 issues would be decided by his court.

6 And so the only issue that we raise here today is
7 what's going to be happening is briefing on motions
8 (indiscernible - 00:44:05) most likely with respect to the
9 complaint, it makes sense to wait until Judge Rakoff rules
10 on what the good faith standard would be.

11 THE COURT: Uh-huh.

12 MR. LOIGMAN: And we raised that with the trustee
13 both before this motion for leave was filed and more
14 recently leading up to today's hearing.

15 The response from the trustee has been, okay, with
16 respect to the Morrison issue, which was the other issue I
17 mentioned before, they understand that issue is out there
18 and so they won't make responses to this complaint due until
19 20 days after Judge Rakoff issues a decision on Morrison,
20 and to me that seems like a fair compromise to be efficient
21 so we don't -- and what we said is, okay, that's fine,
22 that's not our client's issue, will you do the same thing
23 with respect to the good faith standard, and the trustee has
24 responded that they will not extend the time.

25 Now it may be moot, for example, if the good faith

1 standard is decided before Morrison. No one knows the order
2 in which Judge Rakoff is going issue his decisions. But if
3 that issue hasn't been decided yet we think it makes sense
4 just to wait until the issue is decided so everybody knows
5 what the appropriate standard is when they're briefing to
6 this Court.

7 And the response from the trustee -- and I don't
8 want to mischaracterize the response in any way, so
9 Ms. Ponto can correct me if I misstate it -- but it's
10 basically, well, Judge Rakoff has already decided 546(e) and
11 applied that standard that we discussed a few minutes ago.
12 I said are they conceding that standard would apply to
13 546(c), and Mr. Sheehan, who works with Ms. Ponto, of course
14 responding no, their not conceding that in any way, but
15 so --

16 THE COURT: He implied an actual knowledge, a
17 subjective actual knowledge standard?

18 MR. LOIGMAN: He -- Judge Rakoff applied actual
19 knowledge standard and he was very specific about what he
20 meant actual. It had to be actual knowledge, so not willful
21 blindness, that would not constitute actual knowledge, and
22 he said have the actual knowledge that Madoff was not
23 engaging in securities transactions.

24 THE COURT: Okay. Is that alleged in the fourth
25 amended complaint?

1 MR. LOIGMAN: I think it depends on who you ask.

2 We don't think it's --

3 THE COURT: I understand that, but --

4 MR. LOIGMAN: I -- in my view that is not
5 sufficiently alleged in the fourth amended complaint. I
6 think the trustee would beg to differ with that.

7 THE COURT: But then, you know, if Judge Rakoff
8 decides that -- favorably to you, if that's the right way to
9 put it --

10 MR. LOIGMAN: Right.

11 THE COURT: -- you can make a motion to dismiss
12 those counts I suppose, you're going to make a motion any
13 way.

14 MR. LOIGMAN: We are going to be making a motion
15 in any event --

16 THE COURT: Right.

17 MR. LOIGMAN: -- as Your Honor points out, and so
18 -- but we --

19 THE COURT: So you don't want to be compelled to
20 make the motion before Judge Rakoff decides these cases and
21 maybe the Second Circuit also.

22 MR. LOIGMAN: Yeah, to me that just seems like the
23 efficient way of doing things, and in particular because
24 he's made it clear that his court is the one to decide this
25 particular issue.

1 THE COURT: All right. It doesn't sound like
2 something that has to be asked -- answered today, because
3 your issue may be decided before the Morrison -- I mean the
4 extraterritorial reality issue is --

5 MR. LOIGMAN: That's --

6 THE COURT: -- but if it turns out that you're
7 compelled to file an answer and you can't agree on that you
8 can raise it in a letter or in a motion for an extension of
9 time to moot her answer I suppose.

10 MR. LOIGMAN: Sure, we could always come back to
11 raise that, Your Honor.

12 THE COURT: Right.

13 MR. LOIGMAN: Really just --

14 THE COURT: It just doesn't sound like it's an
15 issue right now.

16 MR. LOIGMAN: Right, and may prove to be entirely
17 moot. I just wanted to flag the issue, Your Honor.

18 THE COURT: Because that issue is raised in
19 motions before me now with Merkin I think.

20 MR. LOIGMAN: That issue, it was -- it is fully
21 raised before Judge Rakoff was argued in --

22 THE COURT: No, I have a motion to dismiss.

23 MR. LOIGMAN: Yeah, it's -- it shouldn't be in
24 front of you right now on that standard at least.

25 THE COURT: Okay.

1 MR. LOIGMAN: Thank you, Your Honor.

2 THE COURT: Thank you.

3 MS. PONTO: Thank you, Your Honor.

4 Your Honor, if I may I just would like to refer
5 the Court to -- Mr. Loigman made some statements about Judge
6 Rakoff's rulings and I would just refer to Court to the
7 actual decision that Judge Rakoff rendered.

8 THE COURT: Is this Katz (ph)?

9 MS. PONTO: No this is in the matter -- there was
10 a common briefing -- this is in the matter of 546(e) because
11 I disagree with some of the statements and the standards
12 that Judge Rakoff said --

13 THE COURT: We really don't have to argue that
14 today. It's not going to be resolved today, it will be
15 resolved at some point, but for present purposes your motion
16 is granted, submit an order.

17 MS. PONTO: Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. LOIGMAN: Thank you, Your Honor.

20 (Whereupon these proceedings were concluded at 10:53

21 AM)

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I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Dawn
South

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Date: March 14, 2014